Seippel v. Sidley Austin Brown & Wood, LLP Doc. 1

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U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
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By NT Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

WILLIAM SEIPPEL, et al.,	§	
	§	
PLAINTIFFS,	§	
	§	
v.	§	**NO. 03-CV-6942 (SAS)(S.D.N.Y.)**
	§	**3-05MC-0066M**
SIDLEY AUSTIN BROWN & WOOD, LLP, et al.,	§	
	§	
	§	
DEFENDANTS.	§	

DEARY MONTGOMERY DEFEO & CANADA, LLP'S MOTION FOR PROTECTIVE ORDER AND MOTION TO QUASH SUBPOENA, AND BRIEF IN SUPPORT

COMES NOW Deary Montgomery DeFeo & Canada, LLP ("DMDC") and files this Motion for Protective Order and Motion to Quash Subpoena (the "Motion"). In support of the Motion, DMDC respectfully shows the Court as follows:

A. Introduction

1. On May 27, 2005, DMDC was served with a subpoena[1] by the Seippel Plaintiffs seeking the production of: 1) all documents produced to DMDC or its clients by Jenkens & Gilchrist; 2) all documents produced by Sidley Austin Brown & Wood, LLP ("Sidley Austin") to DMDC or its clients in any litigation involving the COBRA tax strategy; and 3) all documents produced by Deutsche Bank or DB Alex Brown to DMDC or its clients in any litigation involving the COBRA tax strategy. Because this subpoena is in direct violation of not one but two Orders imposed by the Honorable Shira A Scheindlin in *Denney, et al. v. Jenkens & Gilchrist, et al.*, No. 03-CV-5460(SAS), pending in the

[1] The Seippel subpoena is attached as Exhibit"A" to Deary Montgomery DeFeo & Canada's Appendix of Documents in Support of Its Motion for Protective Order and Motion to Quash Subpoena (hereinafter, the "Appendix").

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Southern District of New York (the "*Denny* case"), as well as requests documents protected by, among other things, attorney-client privilege, work product immunity, and individual privacy rights, DMDC files this Motion for a Protective Order and Motion to Quash Subpoena, seeking the protection of this Court and respectfully requests this Court refer this matter to Judge Scheindlin for her ruling and enforcement of her Orders issued in *Denney*.[2]

B. Procedural History and Background

2. DMDC, a law firm in Dallas, Texas, currently represents approximately 300 individuals with claims against Jenkens & Gilchrist, P.C. ("Jenkens"), Deutsche Bank, AG ("Deutsche Bank"), Deutsche Bank Alex Brown ("DB Alex Brown") and/or Sidley Austin arising out of alleged negligent and fraudulent tax advice and services in connection with various types of tax-reducing strategies.

3. DMDC currently represents 22 plaintiffs (the "Denney Plaintiffs") in a lawsuit against, among others, Deutsche Bank AG, Deutsche Bank Alex Brown, and BDO Seidman, LLP in the U.S. District Court for the Southern District of New York (the *Denney* case). Jenkens was a named defendant but has since entered into a Class Settlement. The presiding judge is the Honorable Shira A. Scheindlin. The Denney Plaintiffs seek class certification.

4. The Seippel Plaintiffs also have a lawsuit presently pending against Deutsche Bank and Sidley Austin in the U.S. District Court for the Southern District of New York (the *Seippel* case). The presiding judge is the Honorable Shira A. Scheindlin. The *Seippel* case apparently arises out of alleged negligent and fraudulent tax advice and services in connection with a tax-reducing strategy that was marketed, sold, and

[2] DMDC has contemporaneously filed a similar motion before Judge Scheindlin in the *Denney* case.

implemented by Ernst & Young, LLP, Jenkens, Sidley Austin, and Deutsche Bank.

5. On or about March 4, 2004, the Denney Plaintiffs, on their own and on behalf of the Class, consummated a settlement with Jenkens. At that time, DMDC directly represented approximately 254 Class Members. This number has increased since the settlement.

6. On May 14, 2004, the District Court in *Denney* preliminarily approved the settlement[3], appointed DMDC as Class Counsel, and set a schedule for the final approval process, including a September 27, 2004 deadline, for opting out of the class.

7. Following preliminary approval, DMDC, as Class Counsel, conducted court-ordered "confirmatory" discovery. As part of this "confirmatory" discovery, Jenkens produced to DMDC over 200,000 pages of documents on four CDs and two DVDs.[4] These documents covered the "waterfront" of Jenkens' involvement in the tax shelter business, encompassing approximately eight different types of tax strategies (only one of which is "COBRA"). confidential information and communications with approximately 1100 former Jenkens' clients, Jenkens' dealing with dozens of different accounting, law, and investment firms, and dealings within Jenkens. These documents, for the most part, were produced to DMDC "unredacted". The settlement terms permitted, with certain limitations and restrictions, Class Members to obtain these documents to the extent they were relevant to the Class Member's *specific* claims against their *specific* Defendants on their *specific* tax strategy. Of course, DMDC did not produce "unredacted" documents to Class Members. Nor did DMDC produce to Class Members the documents the Seippel

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[3] A copy of the Order Preliminarily Certifying a Settlement Class and Approving Settlement is attached as Exhibit "B" to the Appendix.

[4] The information contained on the CDs and DVDs is in pdf format and not organized or grouped in any logical way. *See* Canada Affidavit attached as Exhibit "C" to the Appendix.

subpoena seeks. Class Members who elected to opt out of the Class Settlement were not entitled to obtain any of the Jenkens documents DMDC received during the "confirmatory" discovery process. The Seippels opted out of the Class Settlement.

8. As part of the Court's Order preliminarily approving the Class Settlement, the Court ordered that the class certification process and the approval and administration of the settlement be conducted in such a way as to assure the continued confidentiality of unnamed Class Members' identities. No party was permitted to disclose in any filing or in open court either the Class Member identities or personal or other information from which Class Member identities could be determined. *See* Exhibit "B" at ¶¶ 21-29.

9. At the time the Court entered the Order preliminarily approving the settlement, there were three other pending cases against Jenkens & Gilchrist. As a result of the Court entering a preliminary injunction as part of the preliminary approval, the Court's Order allowed counsel for the three other pending cases to obtain from Class Counsel certain limited documents for the purpose of evaluating the fairness of the settlement as it related to their specific clients. The *Seippel* case was one of the three other pending cases. As a result, Class Counsel provided Seippel's counsel, Fensterstock & Partners, certain limited categories of documents set forth in the Court's Order.[5] Shortly after receiving these documents, the Seippels opted out of the Class Settlement.

10. Shortly after "confirmatory" discovery commenced, it became clear to Jenkens that it would be unduly burdensome for Jenkens to redact confidential information of Class Members contained in the approximately 200,000 pages of documents. As a result, in order to facilitate the "confirmatory" discovery process, on July 9, 2004, the Court

[5] This information is contained in the four CDs.

entered an Order Granting Motion for Disclosure and Protective Order.[6] The *Denney* Court ordered Jenkens to produce to Class Counsel documents, which were required to be produced pursuant the Settlement Agreement and Order Preliminarily Certifying the Class, without redacting information which identifies Class Members or which discloses the confidential tax information of any particular Class Member. After the Court entered the Order Granting Motion to Disclosure and Protective Order, Jenkens produced to Class Counsel approximately 200,000 pages of unredacted documents which contain confidential information regarding approximately 1100 former Jenkens' clients on approximately eight different types of tax strategies.[7] Importantly, as discussed below, the July 9 Order prevents the Seippel Plaintiffs from obtaining the documents the Seippels seek in Request for Production No. 1 of their subpoena to DMDC.

11. The deadline for Class Members to elect to opt out of the class was September 27, 2004. The Seippels elected to opt out of the Class and did not retract their election to do so at any point. Upon opting out, the Seippels were no longer entitled to receipt of documents from Class Counsel and were explicitly prohibited by the July 9 Order from obtaining any of the unredacted Jenkens documents from Class Counsel. *See* Exhibit "D", ¶¶ 4-5.

12. On February 18, 2005, the *Denney* Court entered the Final Judgment approving the settlement.

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[6] A copy of the Order Granting Motion for Disclosure and Protective Order is attached as Exhibit "D" to the Appendix.

[7] The two DVD's contain the unredacted documents produced by Jenkens pursuant to the July 9 Order. Additionally, Jenkens has also produced several supplemental CDs, also with unredacted documents. Both the DVDs and the CDs contain pdf files in no logical order. Thus, the only way to protect the privacy of other individuals who are not DMDC clients is for DMDC employees to go through the documents one by one and print off whatever they find that pertains to the Seippel Plaintiffs and redact those documents as to any information not relating solely to the Seippels. This process would take an enormous amount of time due to the voluminous amount of documents contained on the DVDs and CDs. *See* Canada Affidavit, attached as Exhibit "C" to the Appendix.

C. **The Seippel Subpoena**

13. On May 27, 2005, the Seippels served DMDC with a subpoena, directing DMDC to produce over 200,000 of documents DMDC obtained as Class Counsel for the Jenkens settlement and documents DMDC obtained during discovery on behalf of the Denney Plaintiffs and other DMDC clients from Deutsche Bank and Sidley Austin.

14. The Seippel subpoena seeks the following documents from DMDC and their clients:

> **Request No. 1.** All documents produced to DMDC or DMDC's clients by Jenkens & Gilchrist in connection with *Denney, et al. v. Jenkens & Gilchrist, et al.*, No. 03-CV-5460(S.D.N.Y.), or any other case concerning COBRA.
>
> **Request No. 2.** All documents produced by Sidley Austin to DMDC or DMDC's clients in any litigation concerning COBRA.
>
> **Request No. 3.** All documents produced by Deutsche Bank or Deutsche Bank Alex Brown to DMDC or DMDC's clients in any litigation concerning COBRA.

15. In essence, the Seippel Plaintiffs are attempting to obtain documents in violation of Judge Scheindlin's July 9 Order and May 14 Order (with respect to the Jenkens documents); information and documents regarding individuals who are represented by DMDC or other law firms or who are unrepresented; and information that has nothing whatsoever to do with the Seippel's *specific* tax strategy or *specific* claims against the *specific* Defendants in their currently pending case. Rather than seeking the production of documents from Jenkens, Deutsche Bank, and Sidley Austin in their own case that are relevant to their own *specific* claims against these Defendants, the Seippels are attempting to circumnavigate a federal judge's orders. The Court should not condone this abusive behavior. To the contrary, this Court should enter a Protective Order and refer this matter to Judge Scheindlin for her ruling and enforcement of her orders in the

Denney case. In the alternative, this Court should sustain DMDC's objections, grant DMDC's Motion for Protective Order and Motion to Quash, and instruct the Seippels to conduct discovery from the Defendants in their own case.

D. The Seippels Are Not Entitled to the Jenkens Documents Obtained by DMDC

16. The Seippel subpoena seeks the following documents from DMDC in Request No. 1: "All documents produced to you or your clients by Jenkens & Gilchrist in connection with *Denney, et al. v. Jenkens & Gilchrist, et al.*, No. 03-CV-5460 (S.D.N.Y.), or any other case concerning COBRA." *See* Exhibit "A" at p. 3.

17. The Seippels seek two categories of documents: (1) over 200,000 pages of documents Jenkens produced to DMDC, as Class Counsel, in connection with the court-ordered "confirmatory" discovery process of the Jenkens settlement; and (2) documents produced by Jenkens to DMDC regarding DMDC's clients. The Seippels are not entitled to discovery of either category of documents for several reasons.

1. Judge Scheindlin's Orders Prohibit Production of Jenkens Documents.

18. First and foremost, Judge Scheindlin's July 9 Order expressly prohibits DMDC from producing the Jenkens documents to the Seippels. This Order is binding on the Seippels and their counsel, as the Seippels were Class Members at the time the Order was entered and their counsel was designated as "Interested Counsel" at the time. In addition, under the terms of the settlement and the Court's Order dated May 14, 2004 certifying the settlement, once the Seippels opted out of the Class, they are entitled to none of these documents from Class Counsel.[8] *See* Exhibit "B" at ¶ 37(c).

19. Judge Scheindlin's July 9 Order sets forth the following restrictions on the

[8] Obviously, they can still seek to subpoena them directly from Jenkens, as they apparently have **also** done.

Jenkens documents obtained by DMDC or Class Counsel:

- Jenkens shall produce the documents to DMDC without redacting information which identifies Class Members or which discloses the confidential tax information of any particular Class Member. *See* Exhibit "D" at ¶¶ 1-2.

- The disclosure of this information to Class Counsel does not waive any claim of confidentiality or privilege. *See* Exhibit "D" at ¶ 3.

- DMDC shall not further disclose this information without order of the Court, permission of the individuals whose information might be disclosed, or redaction of all confidential information, and DMDC is not required to engage in such redaction except and to the extent DMDC deems necessary. *See* Exhibit "D" at ¶ 4.

- All documents and information produced by Jenkens to DMDC "shall be subject to this Protective Order requiring Class Counsel and their agents to maintain the identify of all Class Members in the strictest confidence and not disclose such identities to any person other than to the Court *in-camera* and then only if such disclosure is reasonably necessary for the Court to address a specific issue . . . All written and electronic materials received or generated by Class Counsel containing Class Members' identifies or information from which one could determine Class Member identifies shall be subject to this protective order." *See* Exhibit "D" at ¶ 5.

20. Accordingly, a federal judge's court order prohibits DMDC from producing the documents DMDC obtained from Jenkens in connection with the Jenkens Class Settlement in *Denney* or any other case concerning COBRA.

21. For the reasons set forth above, DMDC respectfully requests this Court enter a Protective Order and refer this matter to Judge Scheindlin for her ruling and enforcement of her July 9 and May 14 Orders issued in the *Denney* case. In the alternative, DMDC asks that this Court sustain DMDC's objections, grant DMDC's Motion for Protective Order and Motion to Quash, and instruct the Seippels to conduct discovery from the Defendants in their own case.

2. The Jenkens Documents Are Not Discoverable for Other Reasons Besides the Court Orders.

22. The Seippels seek production of over 200,000 pages of documents which encompass, among other things, information on approximately eight different types of tax strategies (only one of which is COBRA), confidential information on approximately 1100 individuals, and confidential information on DMDC's clients. In addition, the Seippels seek discovery of the documents DMDC has obtained on behalf of DMDC's clients during discovery in their cases.

23. As a result, DMDC objects to Request No. 1 on the grounds it seeks information that is protected by these individuals' attorney-client privilege and attorney work product immunity.

24. DMDC further objects to Request No. 1 on the grounds it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in the Seippels' case.

25. DMDC further objects to Request No. 1 on the grounds it seeks confidential information of approximately 1100 individuals, including DMDC's clients, that is protected from discovery by each individual's constitutional right to privacy.

26. DMDC further objects to Request No. 1 on the grounds that it would be unduly burdensome and expensive for DMDC to redact all of the confidential information in the 200,000 pages of documents.

27. DMDC further objects to Request No. 1 on the grounds that it is harassing and oppressive. The Seippels should seek discovery of the Jenkens documents directly from Jenkens rather that attempt to require DMDC to violate a federal judge's orders, raid DMDC's files, and provide documents DMDC has obtained on behalf of DMDC's

clients. Based on information and belief, the Seippels have served a subpoena on Jenkens seeking these same documents.

28. DMDC further objects to Request No. 1 on the grounds it seeks information that is protected from discovery under Rule 408 of the Federal Rules of Evidence.

29. For the reasons set forth above, DMDC respectfully requests that this Court enter a Protective Order and refer this matter to Judge Scheindlin to rule on and enforce her orders in the *Denney* case. In the alternative, this Court should sustain DMDC's objections, grant DMDC's Motion for Protective Order and Motion to Quash, and instruct the Seippels to conduct discovery from the Defendants in their own case.

E. The Seippels are Not Entitled to the Sidley Austin Documents Obtained by DMDC

30. The Seippel subpoena seeks the following documents in Request No. 2: "All documents produced by Sidley Austin to you or your clients in any litigation concerning COBRA." *See* Exhibit "A" at p. 4. Once again, rather than the Seippels seeking documents directly from Sidley Austin that are relevant to the Seippel's claims against Sidley Austin in their case currently pending before Judge Scheindlin in the Southern District of New York, they are attempting to raid DMDC's files to obtain documents DMDC has obtained on behalf of DMDC's clients during discovery. The Seippels are not entitled to these documents except for those documents pertaining specifically to the Seippels.[9]

31. DMDC objects to Request No. 2 on the grounds it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in the Seippel's case.

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[9] Sidley Austin has not yet produced any documents in any cases to DMDC. However, in the event they do produce such documents, the Seippels are not entitled to such for the reasons stated in this Section.

32. DMDC further objects to Request No. 2 on the grounds that it is unduly burdensome, harassing, and oppressive.

33. DMDC further objects to Request No. 2 on the grounds it seeks confidential information, including confidential financial information, of individuals that have nothing whatsoever to do with the Seippels' case and is protected and privileged from discovery by the individual's constitutional right to privacy.

34. DMDC further objects to Request No. 2 on the grounds it seeks information that is protected and privileged by the attorney-client privilege and attorney work product immunity.

35. Accordingly, DMDC respectfully requests that this Court enter a Protective Order and refer this matter to Judge Scheindlin to rule on and enforce her orders in the *Denney* case. In the alternative, this Court should sustain DMDC's objections, grant DMDC's Motion for Protective Order and Motion to Quash, and instruct the Seippels to conduct discovery from the Defendants in their own case.

F. The Seippels Are Not Entitled to the Deutsche Bank Documents Obtained by DMDC

36. The Seippel subpoena seeks the following documents in Request No. 3: "All documents produced by Deutsche Bank or Deutsche Bank Alex Brown to you or your clients in any litigation concerning COBRA." *See* Exhibit "A" at p. 4. Once again, rather than the Seippels seeking documents directly from Deutsche Bank that are relevant to the Seippel's claims against Deutsche Bank in their case currently pending before Judge Scheindlin in the Southern District of New York, they are attempting to raid DMDC's documents to obtain documents DMDC has obtained on behalf of their clients during discovery. The Seippels are not entitled to this information except for those

documents pertaining specifically to the Seippels.

37. DMDC objects to Request No. 3 on the grounds it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in the Seippel's case.

38. DMDC further objects to Request No. 3 on the grounds that it is unduly burdensome, harassing, and oppressive.

39. DMDC further objects to Request No. 3 on the grounds it seeks confidential information, including confidential financial information, of individuals that have nothing whatsoever to do with the Seippel's case and is protected and privileged from discovery by the individual's constitutional right to privacy.

40. DMDC further object to Request No. 3 on the grounds it seeks information that is protected and privileged by the attorney-client privilege and attorney work product immunity.

41. Accordingly, DMDC respectfully requests that this Court enter a Protective Order and refer this matter to Judge Scheindlin to rule on and enforce her orders in the *Denney* case. In the alternative, this Court should sustain DMDC's objections, grant DMDC's Motion for Protective Order and Motion to Quash, and instruct the Seippels to conduct discovery from the Defendants in their own case.

PRAYER

For the foregoing reasons, Plaintiffs respectfully request that this Court enter a Protective Order and refer this matter to Judge Scheindlin to rule on and enforce her orders in the *Denney* case. In the alternative, this Court should sustain DMDC's objections, grant DMDC's Motion for Protective Order and Motion to Quash, and instruct the Seippels to conduct discovery from the Defendants in their own case.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

On or about June 2 and June 7, 2005, Ralph Canada of DMDC conferred with Maureen McGuirl of Fensterstock & Partners LLP regarding DMDC's response to the Seippels' subpoena. McGuirl stated that the Seippels were going to file a motion before Judge Scheindlin in the Southern District of New York regarding the subpoena; DMDC has not yet received such a motion or notice that such a motion has been filed. Canada further requested that the Seippels withdraw their subpoena from the Northern District of Texas and seek the production of documents directly from Jenkens & Gilchrist. McGuirl refused to do such; however, the Seippels also served Jenkens with a subpoena in the Northern District of Texas as well. As a result, this matter is submitted to this Court.

W. Ralph Canada, Jr.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served via regular and electronic mail upon all counsel of record on the 13th day of June, 2005:

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